Justice Douglas on The Right of Radicals to Work, Page Two

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Talking Tough, While Brandishing A Twig

The issue of *Newsweek* dated April 26 described the Eisenhower Administration in the Indo-Chinese crisis as "calm but implacable." The *Washington Post* of Sunday, April 25, had carried an eight column streamer, "U.S. Will Be Playing Strong New Hand at Geneva." This was the general impression created by Dulles and Nixon. But overnight something happened. "U.S. Spurns More Active Indo Rule," said the same paper's headlines next morning. "Loss of Country to Reds Regarded as Preferable to Belligerent Status." That same day the President, addressed the U.S. Chamber of Commerce in a quite different key from that of his Vice President and his Secretary of State. Eisenhower expressed the "hope that the logic of today's situation would appeal to all peoples, regardless of their ruthlessness" to "see the futility of depending upon war or the threat of war" and that at least a "*modus vivendi*" might be reached in Geneva. "Modus vivendi" means a way of living together, i.e. of co-existence. Perhaps the President was afraid to say this in a language more Congressmen could understand.

The climbdown continued. On Tuesday Nixon explained to a conference of state governors that the Eisenhower Administration does not want to send troops into Indo-China "but we can't let the Russians know that." Presumably the Air Force had strict orders to shoot down all carrier pigeons carrying copies of that day's newspapers to Moscow. Next day David Lawrence reported from Geneva, that nobody wanted war but that "the new development which has Soviet Russia guessing is that American representatives talk as if they are prepared to go the limit to save Southeast Asia." Lawrence went on to add in an aside not meant for the ears of the Kremlin, "But it should be clearly understood America has not the slightest intention of 'going it alone' and will enter a local war in Southeast Asia only if all the other nations agree to collective action." What had happened to that talk of taking any risk to prevent Indo-China from going Communist? The Eisenhower Administration had reversed Teddy Roosevelt's maxim about walking softly but carrying a big stick. It talked big, and unsheathed an undersized twig.

The G.O.P. Preferred A Bipartisan War

Washington has never looked sillier than in last week-end's reversal. Some of the factors which played a part may be spelled out. There was first of all an unsuccessful effort by Dulles and Admiral Radford to sell two forms of intervention to Congressional leaders. The first was limited intervention by airpower from U.S. carriers in Indo-China waters. The second was for a Congressional resolution giving Eisenhower a blank check in advance to intervene in Indo-China as he saw fit. Many Republicans, still deeply isolationist, hung back. Many Democrats, interventionist by conditioning, were willing to go along on Indo-China [Senator Ed Johnson, see his speech on page 3, is an exception] but only if the Administration took the responsibility for "Ike's war." The Republicans preferred to share the honors.

Dulles and Nixon set out to prepare the public mind for war, but only succeeded in waking the popular desire for peace. There was a flood of mail against intervention, and as we went to press the House leadership was trying hard to beat down an appropriations rider by Congressman Coudert (R., N.Y.) forbidding the President to send troops abroad without Congressional approval. The China Lobby crowd was finding few takers for its line that no American boys would be needed since we could "release the armed forces of the free nations of Asia" (Jenner), placing at our service "the fourth and fifth largest armies on earth, the Nationalist Chinese and the South Koreans" (Bridges to the D.A.R.), who would do the fighting for us "more than 1,100,000 strong" (Knowland). No doubt the possibility of an alliance with Chiang and Rhee played its part in the next big failure of the Dulles-Radford team—the inability to sell "united action" in London and Paris.

Peace By Some Miracle . . .

One cannot exclude the possibility that Peiping let it be known that it would intervene in Indo-China if we did. The risks of going it alone politically at home and militarily abroad weighted the scales against Dulles and Radford. In any case there is little reason to believe that more men and materiel, even if they could be gotten into the Indo-Chinese jungles, would turn the tide. According to Senator Mansfield (D., Mont.) the French Union forces are losing though they have a 5-3 edge over the rebels in manpower and are getting ten times as much tonnage from us as Ho's forces get from the Chinese. Dien Bien Phu was given up some time ago. The real worry is whether the French can hold on in the North, or at least make an orderly withdrawal along the single road and rail line which connects Hanoi with the South, and which are constantly being cut by the rebel forces.

Except for Radford, the Chiefs of Staff have been opposed to intervention, though ready to be "united" if Dulles and Radford could find other nations to supply the "action." In this they reflect the national mood; we have no objections to policing the world so long as it can be done by pushbutton. We are ready to fight Communism everywhere, if others will carry the guns, and especially if only Asians (whom we regard as bargain basement warriors) will fight Asians. So with the backdown at Geneva, peace by some miracle has a fighting chance.

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Can Dissenters Be Deprived of Profession and Livelihood?

Only A Supreme Court Minority Upholds Their Right to Work

As part of the American thought control drive blueprinted by the U.S. Chamber of Commerce in 1946, radicals are being deprived of the right to work and to practice their professions. Last week the U.S. Supreme Court touched upon the issue in the case of Dr. Edward A. Barsky, a noted New York surgeon, who has been hounded ever since he served in Spain and became chairman of the Joint Anti-Fascist Refugee Committee.

Dr. Barsky had appealed to the Supreme Court against a six month suspension from practice imposed upon him by the New York Board of Regents. The penalty was the result of his conviction (and six months sentence) for contempt of the House Un-American Activities Committee in 1946 when he refused to turn over the records of the Joint Anti-Fascist Refugee Committee. The Supreme Court, 6-3, upheld the suspension.

Because of the importance of the case and because even the New York Times did not give text, we are reprinting the heart of the separate dissents by Justices Frankfurter and Black and the text of the dissent by Justice Douglas, which we believe will prove historic.

Mr. Justice Frankfurter, dissenting, in Barsky v. Regents:

"It is one thing thus to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession."

Mr. Justice Douglas, dissenting, with whom Mr. Justice Black concurs:

"Mr. Justice Holmes, while a member of the Supreme Judicial Court of Massachusetts, coined a dictum that has pernicious implications. 'The petitioner may have a constitutional right to talk politics,' he said, 'but he has no constitutional right to be a policeman.' See *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517. By the same reasoning a man has no constitutional right to teach, to work in a filling station, to be a grocery clerk, to mine coal, to tend a furnace, or to be out on the assembly line. By that reasoning a man has no constitutional right to work.

"The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on *Politics*, 'A man has a right to be employed, to be trusted, to be loved, to be revered.' It does men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow men.

"The dictum of Holmes gives a distortion to the Bill of Rights. It is not an instrument of dispensation but one of deterrents. Certainly a man has no affirmative right to any particular job or skill or occupation. The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain rights are protected, that certain things shall not be done. And so the question here is not what government must give, but rather what it may not take away.

"The Bill of Rights prevents a person from being denied employment as a teacher who though a member of a 'subversive' organization is wholly innocent of any unlawful purpose or activity. *Wieman v. Updegraff*, 344 U.S. 183. It prevents a teacher from being put in a lower class scale than white teachers solely because he is a Negro. *Alston v. School Board*, 112 F. 2d 992. Those cases illustrate the real significance of the Bill of Rights.

"So far as we can tell on the present record, Dr. Barsky's license to practice medicine has been suspended, not because he was a criminal, not because he was a Communist, not because he was a 'subversive,' but because he had certain unpopular ideas and belonged to and was an officer of the Joint Anti-Fascist Refugee Committee, which was included in the Attorney General's list." If, for the same reason, New York had attempted to put Dr. Barsky to death or put him in jail or to take his property, there would be a flagrant violation of due process. I do not understand the reasoning which holds that the State may not do these things, but may nevertheless suspend Dr. Barsky's power to practice his profession. I repeat, it does a man little good to stay alive and free and propertied, if he cannot work.

"The distinction between the State's power to license doctors and to license street vendors is one of degree. The fact that a doctor needs a good knowledge of biology is no excuse for suspending his license because he has little or no knowledge of constitutional law. In this case it is admitted that Dr. Barsky's 'crime' consisted of no more than a justifiable mistake concerning his constitutional rights. Such conduct is no constitutional ground for taking away a man's right to work. The error is compounded where, as here, the suspension of the right to practice has been based on Dr. Barsky's unpopular beliefs and associations. As Judge Fuld, dissenting in the New York Court of Appeals, makes clear, this record is 'barren of evidence reflecting on appellant as a man or a citizen, much less on his professional capacity or his past or anticipated conduct toward his patients.'

"Neither the security of the State nor the well-being of her citizens justifies this infringement of fundamental rights. So far as I know, nothing in a man's political beliefs disables him from setting broken bones or removing ruptured appendixes, safely and efficiently. A practicing surgeon is unlikely to uncover many state secrets in the course of his professional activities. When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt and look critically at the neurosis that has possessed us."

Mr. Justice Black, with whom Mr. Justice Douglas concurs:

"This record reveals, in my opinion, that New York has contravened the Constitution in at least one, and possibly two respects. First, it has used in place of probative evidence against Dr. Barsky an attainder published by the Attorney General of the United States in violation of the Constitution. . . . the lawyer of the Regents introduced evidence that the Refugee Committee headed by Dr. Barsky had been listed by the Attorney General of the United States as subversive. Pages and pages of the record are devoted to this listing, to arguments about its meaning and to other innuendoes of suspected Communistic associations of Dr. Barsky without a single word of legal or credible proof . . . This Court, however, has held that the Attorney General's list was unlawful, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123. My view was and is that the list was the equivalent of a bill of attainder which the Constitution expressly forbids. The Regents' own reviewing Committee on Discipline recognized the illegality of the list and advised the Regents that no weight should be given to it . . . The Regents, however, accepted and sustained the [contrary] determination of the Grievance Committee . . . New York's highest court said it was without power to review the use of the Attorney General's list. Our responsibility is, however, broader . . . Dr. Barsky had a constitutional right to be free of any imputations on account of this illegal list. That reason alone should in my judgment require reversal of this case."

The Textual Documentaries on These Two Pages Are Examples of Coverage

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Senator Johnson's Historic Anti-War Speech

Free World vs. Communism? "I Wish It Were That Simple"

On Monday, April 19, after the Nixon "off the record" speech, Senator Ed Johnson (D., Col.) rose in the Senate to say that "as a guest at a private party in the company of a large group of Democratic Senators some weeks ago, I heard the Vice President, Mr. Nixon, 'whooping it up for war' in Indo-China." The Senator promised a more extended statement in a few days, saying only at that time "I am against sending American GI's into the mud and muck of Indo-China on a blood-letting spree to perpetuate colonialism and white man's exploitation in Asia." The "extended statement," last Monday, was the first forthright anti-war speech in the Senate during the crisis and those who want peace should arm themselves with copies for their friends. Because too little attention has been paid to the speech (not a line in the Nation of May 1 or the New Republic of May 3) we are devoting this page to the text of the principal points made by Senator Johnson:

A Half Million American Lives

"This present crusade to send troops to Indo-China, with its uncalculated cost for an uncalculated result, is the most foolhardy venture in all American history. It is my guess that it would mean, at the very minimum, 500,000 American casualties and a very minimum of $100 billion of borrowed money [which would mean] . . . a 25-cent dollar instead of our 50-cent dollar . . .

"Such a war could last ten years, or it could touch off and spawn a world war which would have to be fought for 100 years without victory. It could drive the brown and Malay races into the arms of the Communists in a solid front against the white race in a death struggle, which eventually would destroy all civilization. . . .

"The other day a Senator whose sound judgment I respect greatly questioned whether military intervention by the United States in Indo-China would not give Red China the excuse it wants also to intervene. There are no reasons to doubt that result . . . Such an American-Chinese war would be fought not in a place of our own choosing, but in China's back-yard and 7,000 miles from the shores of America . . .

Our McCarthyite Diplomacy

"A few hours ago the President said in Kentucky that regardless of how this war started, it was now the free world versus communism. I wish it were that simple . . . Edward R. Murrow says that Senator McCarthy thinks every critic is a Communist. In world affairs, our diplomats seem also to be making that basic McCarthy error . . .

"I am unable to support the belief that the conflict between the French-supported Viet Nam and the rebel Viet Minh is, in truth, a war of the forces of freedom, on the one hand, and the forces of communism, on the other hand. Soviet communism, with its contempt for the rights of the individual, is a despicable tyranny. But it is not the only tyranny. Unbridled imperialism, the law of the jungle that says the strong shall devour the weak, the 'haves' shall exploit the 'have-nots' is no less . . . the uncompromising enemy of our American principles . . .

Peace Is Voiceless in the USA

"Forces are at work to get this nation committed to war in Asia. Some of these forces we know to be our enemies . . . Unfortunately, there seems to be no articulate force in America determined to keep us out of war. But because it is not articulate, do not think for a moment that this force is not present. Congress must give it a voice that will be heard and that will be heard in time . . .

"Our press and radio during the past few weeks have pulled no punches . . . in describing France's Indo-China enemies, the Viet Minh as 'the Communist forces! This war has been going on for nearly eight years. As recently as 5 years ago the Viet Minh were not labelled, even by the less responsible press, as Communists. As recently as 5 months ago, they were not so identified, even by the French. In fact, even 90 days ago dispatches from Saigon discreetly and consistently called them the Communist-led Viet Minh, but never the Communist forces, or the Communist Viet Minh.

"At what point, and to what degree, has this war, which every record shows to have been a war for freedom and independence, a war against imperialism, at what point did it suddenly become a war of Communist aggression? . . .

"Asia is in revolution—revolution against colonialism. The promulgation of what we in America believe are the inalienable rights of every man, and the right to walk as equals with dignity in the world community is sweeping Asia . . . The astonishing victories of the Japanese Army in China . . . taught Asiatics for the first time that the Western powers were not invincible . . . The inspiration of Japan's success, coupled with the arms provided by Japan's surrender, literally all over Asia, supplied the two essentials for these nationalist movements . . . It was largely on the crest of this popular tide that Mao Tse-tung rode to final victory . . . Russia was not a factor in Mao's success; in fact, it did nothing for him until after Chiang's defeat . . .

We Thwart What We Inspired

"Nationalism, inspired originally by America, is being thwarted by America, with the aggregate effect of drivng independence movements to Moscow . . . In the minds of a great many Asiatics and Europeans, and members of the Arab States as well, America does not quite know what it is for, and only faintly what it is against . . .

". . . They [our European and Asian allies] know that the war in Indo-China is not a war of Communist aggression. They know that the forces opposing France's colonial rule in Indo-China are just. They know . . . [that American aid to France] from their point of view might well justify China in helping her southern Asiatic neighbor with traffic in arms and munitions.

"Suppose, for example, Mexico were conquered and held by an Asiatic power. Suppose the people of Mexico rose up and struck down their oppressor. Then suppose an even stronger Asiatic power intervened, to support the status quo . . . Would not we feel obligated in the name of freedom to give our Mexican neighbor revolutionists all aid and comfort? And if the other Asiatic power embarked troops in Mexico, would not we also feel justified in sending our forces to drive them out?

What Sense In Such Slaughter?

"Whether every one of 24 million people of Viet Nam is a Communist or whether not one of them is, is not the question. If all of them are Communists, what is to be accomplished by sending 10 American divisions there, to make them live as we want them to? The only way to combat an idea is with a better idea. What better idea is being advanced by our sending tanks and bombers to slaughter the people of Indochina? . . . Have we so completely abandoned the principles of freedom? . . . What kind of people have we become?

"If we want to make Communists of all the people of Asia . . . if we want to bleed ourselves of all principles and vigor . . . let us join the jungle war . . . But . . . if we mean to restore America to the place it has held for nearly 180 years in the minds and hearts of men, let us demand peace with honor, now, for France in Indochina before it is too late. The negotiations beginning today in Geneva give us one last chance. May we have the wisdom to make the most of it."

Important to Peace and Liberty You Will Not Find As Fully or At All Elsewhere

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JENNINGS PERRY'S PAGE

Pity It Took Army to Tie the Can to Joe

I am not of those who believe that because nothing much is apt to happen at the McCarthy-Army hearing nothing much is happening to Joe McCarthy. True, when the strange show is over he still will be chairman of the permanent Senate subcommittee for investigations, furnished with the ample funds his colleagues were afraid to deny him; he may be minus Cohn and certainly will be minus Schine, but ferrets of this order always can be found. He will be ready to start rummaging for Reds again under the beds of his betters. Withal he will not be able, I think, to stir up the dust he has been able to stir up in the past.

This is not because he himself has been put on the ducking stool nor even because the Eisenhower administration is determined—as in the Dr. Oppenheimer case—to take the play away from him. These things have helped, especially in giving to large sections of the press timidly tolerant of McCarthyism in the past the opportunity to grow a backbone. But the real cloud that is spreading over McCarthy's fetid fireball is the popular awakening, in this pause, to the folly of the witchhunt and the too-widely shared shame of the nation that has let its self-confidence be shaken by arrant and spiteful fearmongers.

Those of us who never have forsaken the American tradition of freedom of the mind all along have had to assume that the good sanity in which our foundation principles were written would return. That at some time when we should have a moment to recollect and to re-assess we would slough off the sickness of suspicion and panic with which so many have been possessed. That the values of fearless thought and open speech and choice of association would come back in the land.

The time-out from the witchhunt for the McCarthy-Army "who lied" inquiry has allowed that interlude for reflection, and the signs of sanity are mending. Later on, loosed on us again, McCarthy will not be able to pull out of his hat any sensation that will not appear to us all shoddy theater, class B and second-run.

The copy-cat witchhunters also, at the moment, have been headed in; and there is no room for regret in the whole matter—save that the tribe could not have been brought to bay on the issue itself: the rights of the individual in a democracy.

The Army is great and powerful in our day, and great and powerful interests in our land which have not bothered to intercede for lowly citizens fallen prey to congressional calumniators have found it possible and prudent to stand up against McCarthy when the turn of slander has begun to threaten military "morale." Perhaps one should not quibble; perhaps tactically this is the point at which the stand against the witchhunt most advantageously could be made. Yet, measured by the height of our principles, it is a pity that the rally could not have come where "only" the morale, the good name, the civil rights of some one American—college professor, scientist, government clerk or simple "leftist" housewife—was at stake.

The issue is not clear: whether McCarthy lied or whether the Pentagon lied has nothing to do with political persecution. The fight is a diversion; yet the fight is important as a diversion, permitting all eyes to view more objectively the body of the real crime in the field from which McCarthy has been drawn. The chances are that during the by-play at Washington the nation will grow up again.

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